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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,

Petitioner,

versus

DREW PEARSON, ROBERT S. ALLEN AND VAN REES PRESS, INC., ET AL.,

Respondents.

PETITIONER'S REPLY BRIEF.

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The Daily Record Co. Print, Baltimore.

INDEX.

SUBJECT INDEX.

	PAGE
Construction of the Copyright Law	1
Copyright and Right to Sue for Infringement are not Separate Rights	5
Prompt Deposit is not Essential for Official Registry	6

CASES CITED.

American Tobacco Co. v. Werckmeister, 207 U. S. 284	1, 2
Bernier v. Bernier, 147 U. S. 242	3
Coffin v. Ogden, 85 U. S. 120	4
Caliga v. Inter-Ocean Newspaper Co., 215 U. S. 182	8
Davenport Quigley Expedition, Inc. v. Century Productions	8
Freedman v. Milnag Leasing Corp.	8
Koppel v. Downing, 11 App. D. C. 93	8
Lumiere v. Pathe Exchange, 275 F. 427	8, 9
Mittenthal v. Berlin, 291 F. 714	8
Peck v. Jenness, 7 How. 612	3, 5
Platt v. Union Pacific R. R. Co., 98 U. S. 48	2

STATUTES CITED.

U. S. C. A. Title 17	5
Sec. 9	4, 5
Sec. 10	7
Sec. 12	4, 7, 8
Sec. 13	4
Secs. 25—28	5
Secs. 34—40	5

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I.

CONSTRUCTION OF THE COPYRIGHT LAW.

The respondents urge a construction of Section 12 of the law that is neither consonant with the general purpose of the copyright law of 1909 as amended nor with the law taken as a whole.

This Court said in a case arising under the copyright law in American Tobacco Co. v. Werckmeister, 207 U. S. 284, at 291:

> "Under this grant of authority (Const. Art. 1, Sec. 8) a series of statutes have been passed, having for their object the protection of the property which the

> author has in the right to publish his production, the purpose of the statute being to protect this right in such manner that the author may have the benefit of this property for a limited term of years. These statutes should be given a fair and reasonable construction with a view to effecting such purpose."

And on page 293 the Court said:

> "As we have seen, the purpose of the copyright law is not so much the protection of the possession and control of the visible thing, as to secure a monopoly having a limited time, of the right to publish the production which is the result of the inventor's thought."

We concede that the secondary purpose of the copyright law in providing the deposit of copies is for the enrichment of the Library of Congress. However, in construing the statute the Court will not allow the provisions relating to the secondary purpose to prevent the carrying out of the primary purpose of the law.

In Platt v. The Union Pacific Railroad Company, 98 U. S. 48, in construing the Land Grants Statute for that Road the Court said:

> "* * * If, as we think it manifest, the leading primary policy of the Act was to place the lands in the hands of the Company, to be used for the completion of the road, as this work progressed, any secondary policy the Government may also have had in view ought not to be allowed to embarrass or defeat that which was primary."

In the case of the American Tobacco Co. v. Werckmeister, *supra*, the Court said further:

> "But in construing a statute we are not always confined to a literal reading, and may consider its

object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment, so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact."

This case is further borne out by the case of Peck v. Jenness, 7 How. at page 623:

"But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the Legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together."

In Bernier v. Bernier, 147 U. S. 242, Justice Field said at page 246, in reconciling two sections of the Revised Statutes known as the Homestead Act, which, if construed separately, were in conflict:

"* * * This construction will give effect to both sections; and it is a general rule, without exception, in construing statutes, that effect must be given to all their provisions if such a construction is consistent with the general purposes of the act and the provisions are not necessarily conflicting. All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it. When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act."

'The whole copyright law is to be taken together and construed in the light of the context. The meaning of these sections must be sought in the import of their language and in the object and policy of the Legislature enacting them.' Coffin v. Ogden, 85 U. S. 120.

It is submitted that the purpose of the instant copyright law was to simplify the requirements for a copyright and to give the owner thereof an enforceable copyright when publication was made with the required notice of copyright thereon, and that a reasonable construction of Sections 12 and 13 is, that the prompt deposit of copies is directory but is not made a condition of the validity of the vested copyright. Sections 12 and 13 are to be construed in the light of Section 9, which grants unequivocally a copyright upon publication with notice, and Section 13 prescribes the penalty for failure to promptly deposit the copies.

We submit that the contentions of the respondents and the opinion of the Lower Court fail to take into account the purpose of the Act as a whole and the proper construction to be placed upon it.

The respondents' argument in the brief filed herein on November 16, 1938, is predicated in the main upon two propositions, namely—

(1) That the copyright itself and the right to maintain an action for infringement thereof are entirely separate and distinct;

(2) That prompt deposit of copies of the copyrighted work is essential in order that there be a "true and correct official registry."

II.

COPYRIGHT AND RIGHT TO SUE FOR INFRINGEMENT ARE NOT SEPARATE RIGHTS.

(1) The first proposition is unfounded and unwarranted. It is axiomatic that 'with every right there is a remedy,' "a legal right without a remedy would be an anomaly in the law." Peck v. Jenness, *supra*, at p. 623. Therefore it follows that the right to protect copyright by suit for infringement thereof is a part and parcel of the copyright itself. See Sections 9, 25 to 28 inclusive, and Sections 34 to 40 inclusive of the present law, U. S. C. A. Title 17. It follows, therefore, that the right and remedy constituted the copyright, and any variance therefrom must be expressly provided by statute.

The present copyright law does not provide for separation of the right and remedy, as alleged by the respondents, but merely that certain requisites as to deposit of copies and registration must be met before suit for infringement of copyright may be instituted. The prior copyright acts and amendments thereto, as cited in respondents' brief (Note 1, p. 4), do not separate the right and the remedy. None of the benefits of copyright could be obtained under those prior acts *unless* certain requisites as to publication, registration, and deposit of copies were met.

The respondents on the lower portion of page 10 of their brief, attributed to their allegedly separately created right of suit for infringement of copyright, a retroactive effect. Their purpose is to include infringements occurring prior to their alleged creation of a right to sue. Their net result is the same as that reached by giving ef-

fect to the patent import of the copyright law, namely, that the right and remedy accrue as one upon publication of a work with notice of claim to copyright, and that deposit of copies and registration are simply prerequisites to the institution of suit for infringement.

The respondents' artificial theory of separation and distinct right and remedy appears to have been set up in an attempt to distinguish the analogous provisions of the English Copyright Law set forth in the petitioner's supplemental brief, (pp. 9-10). They seek to distinguish on the fallacious ground that under the English law right to sue for infringement need only be "perfected," whereas under the American law it must be "created." Also, they thus attempt to sustain the holding of the Lower Court, the consequence of which as pointed out in the petitioner's supplemental brief (pp. 17-18), is that a person can have an *exclusive* right to print, publish and vend a work and yet not be able to prevent others from doing the same.

III.

PROMPT DEPOSIT NOT ESSENTIAL FOR OFFICIAL REGISTRY.

(2) The respondents' second proposition that *prompt* deposit of copies is essential in order that there be an "official registry," is equally untenable. The erroneous contention previously advanced by the respondents was that there must be prompt deposit of copies in order that a true and correct public registry of copyright works be available to the public. This contention seems to have been accepted by the Lower Court in its opinion (R. p. 40). The respondents have now abandoned that erroneous position as they admit in effect, on pages 8 and 9 of their brief, that under the copyright law there can-

not be a true and correct official registry of copyrighted material. As a consequence the respondents now rest their argument as to "official registry" upon the registration provisions of the Act.

The principal error in this new position of the respondents is that the copyright law does not *require* registration at any time during the life of the copyright. It need only be registered before a suit for infringement can be filed. The Register of Copyrights is not empowered by law to demand or enforce registration, although he is so empowered with regard to deposit of copies. Consequently there is no necessity or reason, so far as registration is concerned, that copies be *promptly* deposited. In this connection, the assertion in note 3, page 7, of the respondents' brief, that "a claim of copyright is an application for registration" and "not the notice of copyright," is incorrect. A reading of Section 12 as a whole, from which section the respondents quote in part, (Rspdts' Brief, p. 7) discloses that the phrase "claim of copyright," as used therein, clearly refers to the notice of claim of copyright appearing on the publication. Section 10 of the Act also referred to by the respondents does not speak of "claim *of* copyright" but "claim *to* copyright," which a reading of that section clearly discloses to mean the copyright obtained, as provided in the Act. The proposition advanced by the respondents is therefore without merit.

An official registry, as conceived by the respondents, was not contemplated or provided for in the present Copyright Act, nor can such be effected without changing the law.

Referring again to the case of Koppel v. Downing, 11 App. D. C. 93, and the quotation therefrom, (R. p. 40; Rspdts' Brief, pp. 13-14) that case was decided upon facts that showed that Koppel, who had copyrighted and registered the material in question, was not entitled to either the copyright or the registration. The quotation should be read in the light of these facts. The quoted language means that the registration should record only the true ownership of the copyright as regards the persons entitled thereto.

When, as in the present case, an article is copyrighted by copyrighting the magazine in which it appears, and proper registration is obtained, the registration records will contain no information whatsoever in regard to that article.

Respondents state in their brief at page 14, that they "have been able to find only one case wherein the requirement of prompt deposit in Section 12 was before a court." In your petitioner's brief for writ of certiorari and in the supplemental brief are cited the cases of Lumiere v. Pathe Exchange, 245 F. 428, and Mittenthal v. Berlin, 291 F. 714, and in addition to those two cases there are Freedman v. Milnag Leasing Corporation, 20 F. Supp. 802, and Davenport Quigley Expedition, Inc. v. Century Productions, 18 F. Supp. 974; all of aforesaid cases dealt with the deposit requirement of Section 12 which is now in issue.

The respondents, on page 16 of their brief, purport to show that the case of Caliga v. Inter-Ocean Newspaper Company, 215 U. S. 182 does not hold that reissue of patents is not applicable to copyright. By fragmentary quotations from the opinion in that case they at-

tempt to show that the Court held merely that there can be no double copyrighting; just as under patent law there is no authority for double patenting. They fail to quote that provision in the opinion in which the Court stated:

> "There is no provision, as there is in patent law, for an amended application, and, under patent law it has been held that there is no authority for double patenting."

In the last paragraph on page 18 of respondents' brief they cite as an example a newspaper failing to deposit the copies and register the copyrighted issue in order to save $700.00 a year and to "wait and see if any financially responsible party utilized the material contained in any one of the issues." They overlooked the fact that the fee provided in Section 61 of the Copyright Act is for registration only and no fee is charged for the deposit of copies, and registration is not required to be made during the twenty-eight year life of the copyright.

On page 20 of the respondents' brief they are clearly in error as to the statement of facts in regard to Lumiere v. Pathe Exchange, 275 Fed. 428. The facts in that case are correctly set forth in petitioner's brief on Petition for Writ of Certiorari (R. p. 10).

Respectfully submitted,

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